

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

3:06CV221-1-MU

3:95CR20-2-MU

JAMES LARRY JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ORDER**

**THIS MATTER** comes before the Court upon the Petitioner's Motion to Correct Sentence, filed May 10, 2006.

Petitioner asserts in his Motion that this Court should reverse its decision that he qualifies as a career offender due to a later ruling by this Court in a different, unrelated case.

Petitioner labels his motion a Motion to Correct Sentence and asserts that he is filing it pursuant to 18 U.S.C. § 3742(a). Section 3742(a), however, pertains to the filing of a notice of appeal in this Court. Because Petitioner is requesting that this Court take action; because this Court has not rendered any decision relating to Petitioner's case since 2001; and because he is attacking the validity of his sentence, this Court will treat his motion as Motion to Vacate, Correct, or Set Aside pursuant to 28 U.S.C. § 2255.<sup>1</sup>

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<sup>1</sup> This Court finds that the Court of Appeals for the Fourth Circuit's recent decision in United States v. Emmanuel, 288 F.3d 644 (4<sup>th</sup> Cir. 2002), is distinguishable because, unlike in the Emmanuel case, this would not be Petitioner's first § 2255 motion. Id. at 650 (no notice required where recharacterization has no adverse impact on movant).

The Court next notes that Petitioner filed a previous motion to vacate (case no. 3:98CV438-MU) which was denied on November 6, 2001. Under the Antiterrorism and Effective Death Penalty Act (AEDPA), "a second or successive motion must be certified . . . by a panel of the appropriate court of appeals. . ." 28 U.S.C. § 2255. Therefore, the Petitioner must first certify his claim with the Fourth Circuit Court of Appeals before he can file his successive claim in the District Court.

**THEREFORE, IT IS HEREBY ORDERED** that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence is **DISMISSED** without prejudice as successive.

Signed: May 18, 2006

A handwritten signature in black ink, reading "Graham C. Mullen", written over a horizontal line.

Graham C. Mullen  
United States District Judge

